STATE OF MICHIGAN

COURT OF APPEALS

RIVER ROUGE SCHOOL DISTRICT,

Plaintiff-Appellant,

v

MESTEK, INC.,

Defendant/Cross Defendant-Appellee.[1]

UNPUBLISHED
August 20, 2002

No. 226919
Wayne Circuit Court
LC No. 98-817220-CK

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant on plaintiff's claims for breach of contract and breach of warranty. We affirm.

Plaintiff entered into a contract with Long Mechanical (Long) for various renovations and additions at Sabbath Elementary School, including the installation of nine heating and air conditioning (HVAC) units. Long purchased the HVAC units from Nesbitt, a division of defendant Mestek, Inc. The units were covered under an express limited warranty, which provided that the remedy for breach of either the express warranty or any implied warranty was limited to replacement of defective parts. Plaintiff alleges that the HVAC units broke down numerous times during the four-year period after the units were installed. Defendant twice agreed to extend the warranty covering replacement parts. Plaintiff commenced the present action alleging claims for breach of contract and breach of warranty. Defendant moved for summary disposition under MCR 2.116(C)(10), which the trial court granted. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions,

[1] A cross-claim was filed by Long Mechanical against Mestek. Long's claim was dismissed by stipulation of the parties. While Long is not participating in this appeal, the reference to Mestek's status as cross-defendant in that matter remains.

> and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Initially, we address plaintiff's argument that the trial court erred in concluding that plaintiff was not in privity with defendant. It is not clear to us that the trial court did agree with defendant's contention that no privity existed between the parties. We do agree, however, with plaintiff's assertion that privity existed. MCL 600.1405 provides, in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Pursuant to the statute,

> a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. [*Koenig v City of South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).]

We conclude that plaintiff has sufficiently demonstrated that it was the intended beneficiary of the agreement between defendant and Long. Nonetheless, we conclude that summary disposition was properly granted to defendant on the basis of the express limited warranty of repair.

Plaintiff argues that the trial court erred in granting summary disposition on its breach of warranty claim because there were genuine issues of fact regarding whether defendant's express limited warranty failed of its essential purpose such that plaintiff could pursue other remedies available under Michigan's version of the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*. The UCC permits parties to agree to exclude or modify warranties, MCL 440.2316, or to limit available remedies, MCL 440.2719(1)(a) (providing that the parties to a sales agreement may agree to "limit or alter the measure of damages recoverable under [article 2 of the UCC]"). The HVAC units were sold under an express limited warranty, which reads in pertinent part:

> LIMITED FIRST YEAR PARTS WARRANTY
>
> This Nesbitt unit is warranted free from defects, under normal installation, use and service for one year.
>
> DURATION OF WARRANTY

> This warranty begins on the date of shipment from the factory, with the limited first year warranty period being 18 months, or 12 months from start-up whichever occurs first.
>
> WHAT WE WILL DO
>
> Nesbitt will provide a free part to replace one which becomes defective during the one year warranty period. The replacement may be either new or rebuilt. We or our authorized distributor will send the replacement to the installer. You must pay all transportation and installation charges.

While § 2719(1) permits parties to shape available remedies under a warranty, § 2719(2) further states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act."[2] While the UCC does not define the term "essential purpose," guidance to the proper interpretation of this phrase is found in the official commentary:

> [I]t is the very essence of a sales contract that at least minimum adequate remedies be available. . . . [U]nder subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article. [MCL 440.2719, Comment 1.]

In other words, "when anticipated circumstances cause the seller to be unable to provide the buyer with the remedy to which the parties agreed, that remedy has failed of its essential purpose." *Price Bros Co v Charles J Rogers Construction,* 104 Mich App 369, 374; 304 NW2d 584 (1981).

In order to determine whether an express limited warranty has failed of its essential purpose, the "essential purpose" of the warranty must first be identified. The "essential purpose" of a limited warranty of repair like that present in the case at bar is to provide the seller the opportunity to provide the buyer with the substantial benefit of its bargain by supplying goods that conform to the sales agreement while limiting the seller's exposure for damages that might otherwise be available. *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 111; 394 NW2d 17 (1986); *Chatlos Systems, Inc v National Cash Register Corporation*, 635 F2d 1081, 1085 (CA 3, 1980). When "unanticipated circumstances" preclude the seller from repairing the goods so that they substantially conform, then a limited warranty of repair fails of its essential purpose. See *Severn v Sperry Corp*, 212 Mich App 406, 413; 538 NW2d 50 (1995)(observing that "a warranty fails of its essential purpose where unanticipated circumstances preclude the

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[2] Other remedies available under the UCC include the buyer's loss resulting in the ordinary course of events from the seller's breach and, in a proper case, incidental and consequential damages. MCL 440.2714. Consequential damages available under the UCC include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise" and "injury to person or property proximately resulting from any breach of warranty." MCL 440.2715(2).

seller from providing the buyer with the remedy to which the parties agreed"); *Price Bros, supra* at 374 ("[W]hen unanticipated circumstances cause the seller to be unable to provide the buyer with the remedy to which the parties agreed, that remedy has failed of its essential purpose."). "Moreover, the seller must repair or replace the defective part or condition within a reasonable time, which depends on the nature and circumstances of the case." *King v Taylor Chrysler-Plymouth, Inc,* 184 Mich App 204, 213; 457 NW2d 42 (1990). If repairs are not made within a reasonable time, then "the purchaser may find that the substantial benefit of the bargain has been lost." Eddy, *On the "essential" purposes of limited remedies: The metaphysics of U.C.C. section 2-719(2),* 65 Calif L Rev 28, 63 (1977).

In *Price Bros,* a case involving sewer pipe, this Court recognized that an important distinction exists between a latent defect in goods that leads to damage during installation and damage that occurs as simply a function of problems occurring during installation. *Price Bros, supra* at 375. "If . . . a latent defect in all the pipes caused them to break during installation," the Court observed, "and the replacement pipes were similarly defective, such a situation would clearly have been caused by unanticipated circumstances." *Id.* We do not believe that the evidence in the case at bar establishes that the problems occurring with the HVAC units were "unanticipated" in the sense conveyed by *Price Bros*.

We also do not believe that defendant has been precluded from providing the remedy contracted for, i.e., repair of the HVAC units. In *King, supra* at 213, this Court concluded that notwithstanding an express limited warranty of repair, the plaintiff was entitled to pursue other remedies because the repair remedy that failed of its essential purpose. Underlying this conclusion was a record showing that despite numerous attempts, the defendant had failed to repair a persistent stalling problem with the vehicle plaintiff had purchased from the defendant. *Id.* at 208, 213. See also *Bosway Tube & Steel Corp v McKay Machine Co,* 65 Mich App 426, 430; 237 NW2d 488 (1975)(concluding that an express limited warranty of repair failed of its essential purpose because "several defects were never corrected by defendant"). Conversely, in the case at bar, the evidence established that defendant's service representative was able to repair the HVAC units each time service was required. "So long as the seller repairs the goods each time a defect arises, a repair-and replacement clause does not fail of its essential purpose." *Durfee v Rod Baxter Imports, Inc*, 262 NW2d 349, 356 (Minn, 1977).

Further, this is not a case where the repairs were not done in a reasonable time. In *Kelynack,* this Court concluded that repairs to a motorcycle that took approximately three months to put the vehicle in proper working order were not done in a reasonable time under the circumstances. *Kelynack, supra* at 113. In the case at bar, the record establishes that each repair was made within days. Additionally, in *Kelynack* the motorcycle was inoperable for the three month period it was being repaired. *Id.* Conversely, while some classrooms were temporarily deprived of heat or cooling while repairs were being made to the HVAC units, the record establishes that the school building itself did not completely close at any time because of mechanical problems with the units.

Nor did the school suffer any serious and extended disruption or any serious consequential damages. The plaintiff in *Krupp PM Eng'g, Inc v Honeywell, Inc,* 209 Mich App 104, 105; 530 NW2d 146 (1995), "manufactured compact metal parts from powdered metal by heating the parts in a large furnace." The furnace was not repaired for three years, during which the plaintiff lost a chief customer because of the poor quality of goods produced in the furnace

during that time. *Id.* at 106. Thus, the plaintiff's consequential damages during the time when the furnace was being repaired were not negligible. See *S M Wilson & Co v Smith Int'l, Inc*, 587 F2d 1363, 1375 (CA 9, 1978). While inconvenienced by having to move students from one room to another, the school was nonetheless able to continue operating. There is no evidence that the students' education suffered or that the school lost students due to the problems that developed with the HVAC units.

We also reject plaintiff's argument that defendant breached the warranty of description provided in MCL 440.2313. Plaintiff alleges that it was provided a copy of technical specifications describing the HVAC units, which it then incorporated into the specifications for the bid packages for the work at Sabbath Elementary School. Plaintiff contends that its expert witness, A. James Partridge, testified that the HVAC units provided did not satisfy these specifications. Conversely, defendant maintains that plaintiff failed to present competent evidence that any of the problems associated with the units were the result of a failure to conform to specifications or failure to inspect at the factory, and that even if plaintiff did prove that the units failed to conform to the product specifications, plaintiff's remedy would be limited in accordance with the limited warranty of repair.

After reviewing the record, we do not believe that the evidence presented by plaintiff raises a factual issue regarding whether defendant failed to conform to product specifications. Partridge's main assertions of noncompliance had to do with the nature of proprietary specifications calling for the best of its kind. However, plaintiff chose to use Mestek products, on the recommendation of its own design professionals, to minimize the cost of replacing old units that were also manufactured by Mestek. Regarding Partridge's conjecture that the units had not been factory tested, the documentary record establishes that the HVAC units' operation had been tested before being shipped. Accordingly, this claim fails.

Finally, plaintiff argues that summary disposition was improperly granted because it never accepted the HVAC units or, alternatively, revoked its acceptance. We disagree. Pursuant to MCL 440.2608, a buyer may revoke its acceptance of a commercial unit under certain conditions. However, "[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." *Id.* Moreover, revocation of acceptance "is not effective until the buyer notifies the seller of it." *Id.*

Having concluded that plaintiff could have the same right to enforce the sales agreement as it would have had as a party to the agreement, MCL 600.1405, we also conclude that the trial court erred in finding that plaintiff was precluded from revoking its acceptance of the HVAC units based on a lack of privity. Nonetheless, we agree with defendant that any right by plaintiff to revoke its acceptance was not timely asserted. Whether a buyer has revoked within a reasonable time after he discovers or should have discovered nonconformity depends on the particular circumstances of the case. *Leila Hospital and Health Center v Xonics Medical Systems, Inc*, 948 F2d 271, 276-277 (CA 6, 1991). Plaintiff has presented no evidence that it ever notified defendant that it was revoking its acceptance of the HVAC units. Plaintiff argues that defendant was "put on notice" by at least April 1996. However, this reference is apparently to the April 30, 1996, letter from defendant's service agent, who wrote that the units were unacceptable to the owner and that none of the equipment had been "accepted" by the owner. This letter cannot serve as a revocation of acceptance or notice that plaintiff has not accepted the

HVAC units because plaintiff did not author the letter or send it to defendant. Revocation of acceptance is not effective until the buyer notifies the seller of it. MCL 440.2608.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin